

Before the
Administrative Hearing Commission
State of Missouri



MISSOURI BOARD OF PHARMACY,

Petitioner,

vs.

FRANCES THEXTON,

Respondent.

No. 12-1857 PH

DECISION

Frances Thexton is subject to discipline because she misappropriated a controlled substance and took one pill while on duty as a pharmacist and because she practiced as a pharmacist without a license.

Procedure

On October 15, 2012, the Missouri Board of Pharmacy (“the Board”) filed a complaint seeking to discipline Thexton. On November 1, 2012, we served Thexton with a copy of the complaint and our notice of complaint/notice of hearing. Following a motion to dismiss, which we denied, and two motions concerning the hearing settings, we dismissed the case on September 18, 2013, for failure to file a joint status report.

On October 16, 2013, the Board filed a motion to set aside our order of dismissal. We granted the motion by order issued October 16, 2013. On November 14, 2013, we rescheduled the hearing for February 25, 2014. On November 20, 2013, the Board filed a motion for an

alternate hearing date. We granted the motion and rescheduled the hearing for March 5, 2014. On February 19, 2014, Thexton filed a motion for continuance of the hearing. We granted the motion and rescheduled the hearing for March 27, 2014.

On March 27, 2014, we held a hearing on the complaint. Joshua L. Hill, with Newman, Comley & Ruth, PC, represented the Board. Thexton represented herself. The matter became ready for our decision on August 25, 2014, the date the last written argument was filed.

Findings of Fact

1. Thexton was licensed as a pharmacist in Missouri.¹

I. Misappropriating Hydrocodone/APAP

2. At all relevant times, Thexton was employed as a pharmacist at Walgreens Pharmacy, (“Walgreens”) located at 412 Pawnee, Clinton, Missouri.

3. On December 21, 2010, while on duty as a pharmacist at Walgreens, Thexton experienced severe pain in her wisdom tooth. She knew her mother had a prescription filled for Hydrocodone/APAP (hydrocodone acetaminophen blend), and the bottle of pills was in the “ready bin” in Walgreens.

4. On December 21, 2010, Thexton misappropriated eight tablets from her mother’s filled prescription, one of which she consumed while on duty at Walgreens. She did not pay for the medication. Thexton did not have a prescription for herself for the medication.

5. Hydrocodone/APAP is a Schedule III controlled substance.²

¹ In its complaint, the Board alleged that Thexton’s license was still suspended, but provided no evidence of this. Thexton testified that, at the time of the hearing, her license was active. Tr. at 23. We need not resolve this issue since there is no question that Thexton’s license was suspended at the relevant time alleged in the complaint.

² Section 195.017.6(4)(c). Statutory references, unless otherwise noted, are to the 2013 Supplement to the Revised Statutes of Missouri.

II. Practicing Without a License

6. On March 19, 2011, Thexton's pharmacist license was suspended for failure to file and/or non-payment of Missouri taxes.

7. On October 3, 2011, Board Inspector Andrea Miller visited Western Missouri Medical Center Pharmacy ("Western Pharmacy") in Warrensburg, Missouri, for a routine inspection. Thexton was working as a pharmacist in Western Pharmacy.

8. On October 3, 2011, Thexton's pharmacist license was suspended. Thexton practiced as a pharmacist knowing she did not have a current and active pharmacy license.

Conclusions of Law

We have jurisdiction to hear this case.³ The Board has the burden of proving by a preponderance of the credible evidence that Thexton has committed an act for which the law allows discipline.⁴ "Preponderance of the evidence is that which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows the fact to be proved to be more probable than not."⁵

The Board argues there is cause for discipline under § 338.055.2:

2. The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621 against any holder of any certificate of registration or authority, permit or license required by this chapter or any person who has failed to renew or has surrendered his certificate of registration or authority, permit or license for any one or any combination of the following causes:

(4) Obtaining or attempting to obtain any fee, charge, tuition or other compensation by fraud, deception or misrepresentation;

³ Section 621.045.

⁴ *Missouri Real Estate Comm'n v. Berger*, 764 S.W.2d 706, 711 (Mo. App., E.D. 1989).

⁵ *State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App., W.D. 2000).

(5) Incompetence, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of the functions or duties of any profession licensed or regulated by this chapter;

(6) Violation of, or assisting or enabling any person to violate, any provision of this chapter, or of any lawful rule or regulation adopted pursuant to this chapter;

(7) Impersonation of any person holding a certificate of registration or authority, permit or license or allowing any person to use his or her certificate of registration or authority, permit, license, or diploma from any school;

(12) Failure to display a valid certificate or license if so required by this chapter or any rule promulgated hereunder;

(13) Violation of any professional trust or confidence;

(15) Violation of the drug laws or rules and regulations of this state, any other state or the federal government;

(17) Personal use or consumption of any controlled substance unless it is prescribed, dispensed, or administered by a health care provider who is authorized by law to do so.

I. Misappropriating Hydrocodone/APAP

Thexton admits that she took eight Hydrocodone/APAP pills from her mother's pill bottle and took one of them while on duty. The Board argues that this conduct is cause for discipline under § 338.055.2(5), (13), (15), and (17).

A. Subdivision (5) – Professional Standards

The Board argues Thexton’s conduct constitutes incompetency, misconduct, gross negligence, fraud, misrepresentation or dishonesty in the performance of the functions or duties as a pharmacist.

Incompetency is a general lack of professional ability, or a lack of disposition to use an otherwise sufficient professional ability, to perform in an occupation.⁶ We follow the analysis of incompetency in a disciplinary case from the Supreme Court, *Albanna v. State Bd. of Reg’n for the Healing Arts*.⁷ Incompetency is a “state of being” showing that a professional is unable or unwilling to function properly in the profession.⁸

Misconduct means “the willful doing of an act with a wrongful intention[;] intentional wrongdoing.”⁹ Gross negligence is a deviation from professional standards so egregious that it demonstrates a conscious indifference to a professional duty.¹⁰ Fraud is an intentional perversion of truth to induce another, in reliance on it, to part with some valuable thing belonging to him.¹¹ It necessarily includes dishonesty, which is a lack of integrity or a disposition to defraud or deceive.¹² Misrepresentation is a falsehood or untruth made with the intent and purpose of deceit.¹³

Although very serious, we do not find Thexton’s one incident of diversion to be a state of being showing that she is unable or unwilling to function properly. It was not gross negligence because it was intentional. We also do not find fraud or misrepresentation. Thexton did not

⁶ *Tendai v. Missouri State Bd. of Reg’n for the Healing Arts*, 161 S.W.3d 358, 369 (Mo. banc 2005).

⁷ 293 S.W.3d 423 (Mo. banc 2009).

⁸ *Id.* at 435.

⁹ *Missouri Bd. for Arch’ts, Prof’l Eng’rs & Land Surv’rs v. Duncan*, No. AR-84-0239 (Mo. Admin. Hearing Comm’n Nov. 15, 1985) at 125, *aff’d*, 744 S.W.2d 524 (Mo. App., E.D. 1988).

¹⁰ *Id.* at 533.

¹¹ *State ex rel. Williams v. Purl*, 128 S.W. 196, 201 (Mo. 1910).

¹² MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 359 (11th ed. 2004).

¹³ *Id.* at 794.

misrepresent that she was her mother or defraud anyone. She stole medication from the pharmacy and diverted it from her mother's properly filled prescription. We find that the conduct was dishonest and constituted misconduct.

We find cause for discipline under § 338.055.2(5).

B. Subdivision (13) – Professional Trust

Professional trust is reliance on the special knowledge and skills that professional licensure evidences.¹⁴ It may exist not only between the professional and his clients, but also between the professional and his employer and colleagues.¹⁵

Working as a pharmacist, Thexton had formed a relationship of professional trust and confidence with the pharmacy and its clients. She violated that professional trust when she diverted a controlled substance and consumed it while working as a pharmacist.

There is cause for discipline under § 338.055.2(13).

C. Subdivision (15) – Violation of Drug Laws

The Board alleges that Thexton violated the following drug laws.

Section 195.202 states: “Except as authorized by sections 195.005 to 195.425, it is unlawful for any person to possess or have under her control a controlled substance.” Section 195.180¹⁶ states:

1. A person may lawfully possess or have under his control a controlled substance if such person obtained the controlled substance directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of a practitioner's professional practice or except as otherwise authorized by sections 195.005 to 195.425.

¹⁴ *Trieseler v. Helmbacher*, 168 S.W.2d 1030, 1036 (Mo. 1943).

¹⁵ *Cooper v. Missouri Bd. of Pharmacy*, 774 S.W.2d 501, 504 (Mo. App., E.D. 1989).

¹⁶ RSMo 2000.

We agree that Thexton's misappropriation of a controlled substance violated § 195.202, and there is cause for discipline for violating it. Section 195.180 describes lawful possession; it is not a law that can be violated. Thexton did not violate § 195.180.

Title 21 U.S.C. § 844(a) states:

(a) Unlawful acts; penalties

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice[.]

Thexton's misappropriation of a controlled substance as alleged herein violated 21 U.S.C. § 844(a).

Section 195.060 states:

1. Except as provided in subsection 3 of this section, a pharmacist, in good faith, may sell and dispense controlled substances to any person only upon a prescription of a practitioner as authorized by statute, provided that the controlled substances listed in Schedule V may be sold without prescription in accordance with regulations of the department of health and senior services. . . .

Thexton's misappropriation of a controlled substance violated § 195.060.

Section 195.070 states:

1. A physician, podiatrist, dentist, a registered optometrist certified to administer pharmaceutical agents as provided in section 336.220, or a physician assistant in accordance with section 334.747 in good faith and in the course of his or her professional practice only, may prescribe, administer, and dispense controlled substances or he or she may cause the same to be administered or dispensed by an individual as authorized by statute.

Thexton dispensed the controlled substance to herself in violation of § 195.070.

Title 21 U.S.C. § 829 states:

(b) Schedule III and IV substances

Except when dispensed directly by a practitioner, other than a pharmacist, to an ultimate user, no controlled substance in

schedule III or IV, which is a prescription drug as determined under the Federal Food, Drug, and Cosmetic Act may be dispensed without a written or oral prescription in conformity with section 503(b) of that Act.

Thexton's misappropriation of a controlled substance violated 21 U.S.C. § 829.

Federal regulation 21 C.F.R. § 1306.21 states:

(a) A pharmacist may dispense directly a controlled substance listed in Schedule III, IV, or V that is a prescription drug as determined under section 503(b) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 353(b)) only pursuant to either a paper prescription signed by a practitioner, a facsimile of a signed paper prescription transmitted by the practitioner or the practitioner's agent to the pharmacy, an electronic prescription that meets the requirements of this part and part 1311 of this chapter, or an oral prescription made by an individual practitioner and promptly reduced to writing by the pharmacist containing all information required in § 1306.05, except for the signature of the practitioner.

Thexton's misappropriation of a controlled substance violated 21 C.F.R. § 1306.21.

Title 21 U.S.C. § 331 states:

The following acts and the causing thereof are prohibited:

(b) The adulteration or misbranding of any food, drug, device, or cosmetic in interstate commerce.

Thexton did not adulterate or misbrand the drug; she took it from her mother's prescription bottle. She did not violate 21 U.S.C. § 331.

Title 21 U.S.C. § 353(b) states:

(b) Prescription by physician; exemption from labeling and prescription requirements; misbranded drugs; compliance with narcotic and marihuana laws

(1) A drug intended for use by man which –

(A) because of its toxicity or other potentiality for harmful effect, or the method of its use, or the collateral measures necessary to its

use, is not safe for use except under the supervision of a practitioner licensed by law to administer such drug; or

(B) is limited by an approved application under section 355 of this title to use under the professional supervision of a practitioner licensed by law to administer such drug;

shall be dispensed only

(i) upon a written prescription of a practitioner licensed by law to administer such drug, or

(ii) upon an oral prescription of such practitioner which is reduced promptly to writing and filed by the pharmacist, or

(iii) by refilling any such written or oral prescription if such refilling is authorized by the prescriber either in the original prescription or by oral order which is reduced promptly to writing and filed by the pharmacist. The act of dispensing a drug contrary to the provisions of this paragraph shall be deemed to be an act which results in the drug being misbranded while held for sale.

Thexton dispensed a controlled substance to herself without a valid prescription. She did not misbrand anything or hold anything out for sale. She did not violate 21 U.S.C. § 353(b).

Title 21 U.S.C. § 827 states:

(a) Inventory

Except as provided in subsection (c) of this section –

(3) on and after May 1, 1971, every registrant under this subchapter manufacturing, distributing, or dispensing a controlled substance or substances shall maintain, on a current basis, a complete and accurate record of each such substance manufactured, received, sold, delivered, or otherwise disposed of by him, except that this paragraph shall not require the maintenance of a perpetual inventory.

We have no evidence that Thexton kept or failed to keep a record of the controlled substance she misappropriated. We assume she did not, but, without more, we cannot find she violated 21 U.S.C. § 827.

Thexton violated state and federal drug laws. There is cause for discipline under § 338.055.2(15).

D. Subdivision (17) – Personal Consumption

Thexton consumed a controlled substance that was not prescribed, dispensed, and administered by a health care provider authorized by law to do so. There is cause for discipline under § 338.055.2(17).

II. Practicing Without a License

The Board argues that Thexton's conduct in working as a pharmacist without a license is cause for discipline under § 338.055.2(4), (5), (6), (7), (12) and (13).

A. Subdivision (4) – Obtaining by Fraud, Deception, or Misrepresentation

We have defined fraud and misrepresentation above. Deception means an act designed to cheat someone by inducing their reliance on misrepresentation.¹⁷ Thexton committed fraud, deception, and misrepresentation when she held herself out and worked as a licensed pharmacist for compensation from her employer while her license was under suspension.

There is cause for discipline under § 338.055.2(4).

B. Subdivision (5) – Professional Standards

There was no allegation or proof that Thexton was unable or unwilling to function properly as a pharmacist, so we do not find incompetence. Her conduct was not gross negligence

¹⁷ *State ex rel. Nixon v. Telco Directory Publishing*, 836 S.W.2d 596, 600 (Mo. banc 1993).

because it was intentional. We find that practicing without a license is misconduct, fraud, misrepresentation, and evidences dishonesty.

We find cause for discipline under § 338.055.2(5).

C. Subdivision (6) – Violating Law

The Board’s complaint alleges Thexton violated § 324.010 and § 338.170.¹⁸ Section 324.010 sets forth the procedure for suspending a professional license if the licensee is delinquent on state taxes. While this statute mandated Thexton’s suspension, she did not violate any provision of this statute. Section 338.170 states:

It shall be unlawful for any person not legally licensed as a pharmacist to take, use or exhibit the title of pharmacist, or licensed or registered pharmacist, or the title druggist or apothecary, or any other title or description of like import.

Thexton violated this law when she held herself out and worked as a pharmacist without a license.

There is cause for discipline under § 338.055.2(6).

D. Subdivision (7) – Impersonation

To “impersonate” is “to assume or act the character of[.]”¹⁹ Thexton impersonated a licensed pharmacist when she held herself out and worked as a pharmacist when she was not licensed.

There is cause for discipline under § 338.055.2(7).

E. Subdivision (12) – Failure to Display a Valid License

We do not address the allegation that Thexton failed to display a valid license. Although § 338.055.2(12) was cited as cause for discipline, the Board made no factual allegation in the

¹⁸ RSMo 2000.

¹⁹ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 624 (11th ed. 2004).

complaint that Thexton failed to display the license and cited no law that required such display. We cannot find discipline for uncharged conduct.²⁰

F. Subdivision (13) – Violation of Professional Trust

Practicing as a pharmacist without a license violated the professional trust of her employer and its clients. There is cause for discipline under § 338.055.2(13).

III. Mitigating Circumstances

Thexton asks us to consider mitigating circumstances, but this Commission decides, based on the facts and the law, only whether there is cause for discipline. We have found that there is cause for discipline in this case. We will certify the record to the Board to hold another hearing after which the Board will determine the level of discipline. Thexton may make her mitigation arguments at that hearing.

Summary

Thexton is subject to discipline under § 338.055.2(4), (5), (6), (7), (13), (15), and (17). She is not subject to discipline under § 338.055.2(12).

SO ORDERED on September 16, 2014.

/s/ Sreenivasa Rao Dandamudi
SREENIVASA RAO DANDAMUDI
Commissioner

²⁰ *Dental Bd. v. Cohen*, 867 S.W.2d 295, 297 (Mo. App., W.D. 1993).